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HERITAGE GRAND VACATION CLUB BHD v. PACIFIC FANTASY VACATION SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: W-02(W)-1650-10-2015]
29 JUNE 2016

C ***CIVIL PROCEDURE:*** *Pleadings – Rules of – Claim and evidence in breach of rules of pleadings – Whether a radical departure from pleadings and agreed issues – Whether case passed rules of pleadings*

The appellant ('defendant') herein appealed against the decision of the Judicial Commissioner who allowed the respondent's ('plaintiff') claim notwithstanding that the plaintiff's claim and evidence were in breach of the D rules of pleadings as well as the issues to be tried. It was the pleaded case of the plaintiff that the plaintiff entered into an agency agreement with the defendant on or about February 1999. However, the undisputed fact was that the plaintiff was only incorporated on 24 December 1999 and the February agreement had no legal nexus to the plaintiff. The plaintiff's case, as per the E pleadings, referred to the February agreement, to which the plaintiff had no *locus* throughout, and sought relief.

Held (allowing appeal with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

F **(1)** Pleading rules is one relating to fairness and the court should, at all times, maintain the fairness process. Only in exceptional facts that the 'gold standard', *ie*, that it was not the function of the court to build a case for the plaintiff/defendant inconsistent with the pleaded case, can be compromised. Whether there was an agreement between the plaintiff G and the defendant based on the February agreement was a question of law. No amount of evidence, version or story would change the issue related to law. The plaintiff's version was a radical departure from the pleadings and the agreed issues. It was not just a variation, modification or development of what had been alleged in pleading in question or stated in the issues to be tried relating to law. (paras 4, 13 & 14)

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(2) Based on the facts that the agreement was not signed between the plaintiff and the defendant, absence of alternative claim for *quantum meruit* and that some third party had been paid by the defendant for the services rendered to the defendant, it was not a proper exercise of I judicial discretion to waive the 'gold standard' related to pleading rules to the prejudice of the defendant when the defendant's position was that, there was no valid and enforceable agreement between the plaintiff and the defendant in law. Consequently, the judgment, though meticulous

and reasoned, did not pass the acid test of reasonableness when contrasted with the 'gold standard' relating to pleading rules, its exceptions and its restricted application. (para 14)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') di sini merayu terhadap keputusan Pesuruhjaya Kehakiman yang membenarkan tuntutan responden ('plaintif') walaupun tuntutan dan keterangan plaintif melanggar kaedah-kaedah pliding dan isu-isu untuk dibicarakan. Kes yang diplidkan plaintiff adalah bahawa plaintif memasuki perjanjian agensi dengan defendan pada atau kira-kira Februari 1999. Walau bagaimanapun, fakta yang tidak dipertikaikan adalah bahawa plaintif hanya ditubuhkan pada 24 Disember 1999 dan perjanjian Februari tiada kaitan dengan plaintif. Kes plaintif, menurut pliding, pada sepanjang masa merujuk kepada perjanjian Februari, yang mana plaintif tiada *locus* dan memohon relief.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Kaedah-kaedah pliding adalah sesuatu yang berkait dengan keadilan dan mahkamah wajar, pada setiap masa, mengekalkan proses keadilan. Hanya dalam fakta-fakta khusus, 'gold standard' iaitu, bukan fungsi mahkamah untuk membina kes bagi plaintif/defendan bertentangan dengan kes yang diplidkan, boleh dikompromi. Sama ada terdapat perjanjian antara plaintif dan defendan berdasarkan perjanjian Februari adalah persoalan undang-undang. Tiada jumlah keterangan, versi atau cerita yang boleh mengubah isu yang berkait dengan undang-undang. Versi plaintif adalah penyimpangan secara radikal daripada pliding dan isu-isu yang dipersetujui. Ia bukan perbezaan, perubahan atau perkembangan daripada apa yang telah didakwa dalam pliding yang dipersoalkan semata-mata atau dinyatakan dalam isu-isu yang perlu dibicarakan berkaitan undang-undang.

(2) Berdasarkan fakta bahawa perjanjian tersebut tidak ditandatangani antara plaintif dan defendan, ketiadaan tuntutan alternatif bagi *quantum meruit* dan bahawa pihak ketiga dibayar oleh defendan bagi perkhidmatan yang diberikan kepada defendan, bukanlah pelaksanaan budi bicara kehakiman yang wajar untuk mengecualikan 'gold standard' berkaitan kaedah-kaedah pliding sehingga memprejudiskan defendan apabila kedudukan defendan adalah bahawa, tiada perjanjian sah dan berkuat kuasa dari segi undang-undang antara plaintif dan defendan. Dengan itu, penghakiman tersebut, walaupun terperinci dan beralasan, tidak melangkaui ujian kemunasabahan apabila dipertimbangkan dengan 'gold standard' berkaitan kaedah-kaedah pliding, pengecualiannya dan aplikasi terhadnya.

Case(s) referred to:

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Lim Kim Chuan v. Hari Singh [1981] 1 LNS 90 FC ***(refd)***

OCBC Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC ***(refd)***

Pacific Fantasy Vacation Sdn Bhd v. Heritage Grand Vacation Club Bhd [2015] 1 LNS 746 HC ***(refd)***

Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor [2008] 10 CLJ 491 HC ***(refd)***

State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***

Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

For the appellant - Gan Techiong; M/s Gan & Lim
For the respondent - V Manokaran & N Yohendra; M/s Netto & Yohendra

[Editor's note: For the High Court judgment, please see Pacific Fantasy Vacation Sdn Bhd v. Heritage Grand Vacation Club Bhd [2015] 1 LNS 746 (overruled).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/defendant appeals against the decision of learned Judicial Commissioner who allowed the respondent's/plaintiff's claim notwithstanding the plaintiff's claim and evidence were in breach of the pleading rules as well as the issues to be tried.

[2] In the instant case, the plaintiff was not able to establish an agreement between the plaintiff and the defendant as *per* the pleaded case. The hotly contested issue was that there was no such agreement and it was also an agreed issue to be tried before the court. The learned trial judge in reliance of the case of *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185 had written a comprehensive and articulate judgment to substantiate that there was in fact an agreement when there was none in law as *per* the pleaded case.

[3] The agreement in the pleadings related to an agency agreement by Pacific Fantasy Vacation, a business registered under the Registration of Businesses Act 1956. The plaintiff is Pacific Fantasy Vacation Sdn Bhd, a company incorporated under the Companies Act 1965. Both are two different entities in law. The distinction is not one of an apple and an orange but of marble and pumpkin in relation to the facts of this case and the legal status to sue on the agency agreement.

[4] It is well-established that it is not the function of the court to build a case for the plaintiff/defendant inconsistent with the pleaded case. In *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, the Supreme Court had in strong terms held, and which still stands as a 'gold standard' in pleading rules and evidence, as follows:

> *It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings.* The trial of a suit should be confined to the pleas on which the parties are at variance. (emphasis added).

[5] The above case must be seen to be the 'gold standard' for pleading rules and is consistent with a long line of authorities from England as well as Malaysia. (See *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196; *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428; *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10). In *Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] 10 CLJ 491, Hamid Sultan JC (as he then was) on pleading rules and issues to be tried made the following observations:

> After having heard the evidence of the defendants, it is crystal clear to me that the version defendants attempted to project to me was never part of their defence. In such circumstances, the court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. The court is not concerned what issues the parties have framed for the determination of the court, when such issues cannot be reflective of the issues to be dealt with pursuant to the pleadings.

[6] This 'gold standard' also plays an important part when parties as *per* the pleadings have agreed to the issues to be tried. That is to say, the issues to be tried must be as *per* the pleadings or arising from the pleadings and cannot be one which can be said to be the unpleaded case of the parties. The 'gold standard' has a number of exceptions in a restricted sense and those exceptions are not meant to override the 'gold standard' for pleading rules in all aspects. For example:

(a) In the Privy Council decision of *OCBC Ltd v. Philip Wee Kee Puan* [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25; [1984] 2 MLJ 1, a point on acknowledgement of debt which was not pleaded in the statement of claim but introduced in evidence which was admitted, was held by the Privy Council to be part of the total material the judge had to decide the case on. In this case, the respondent relied on the Limitation Ordinance in their defence. The appellant, neither in their statement of claim or

reply had pleaded any acknowledgement of the debt. However, the letter of acknowledgement by the respondent was put in and admitted in evidence during the trial. Lord Bridge of Harwich observed:

> So, in the instant case, the only time when objection could have been taken to the admission in evidence of the respondent's letter of January 14, 1974, on the ground that the acknowledgement had not been placed, was when the evidence was tendered. It is true that if the objection had then been taken and application had been made to amend the pleadings, this could have been successfully opposed on the ground that by January 23, 1980 the right of action deemed to have accrued on the date of the letter had itself become statute-barred. But once the letter was received in evidence without objection this consideration became immaterial. The letter became part of the total material on which the judge had to decide the case and since the writ in the action had been issued well within the period of six years from the date of the letter, the bank's claim, if the letter constituted an effective acknowledgement, was not statute-barred.

(b) The Supreme Court in *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185 accepted the 'gold standard' to the pleading rules but went on to say that evidence when given without any objection by the opposing party, would have the effect of curing the absence of such plea in the relevant pleading, asserting the exception as follows:

> The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v. George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to a proposition, which was approved by *Ang Koon Kau & Anor v. Lau Piang Ngong*, and *John G Stein & Co Ltd v. O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.
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> *Therefore a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured* (emphasis added).
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> In the instant appeal, evidence bearing on the two alleged defences is not such a radical departure but a mere development of what had been alleged by the defendants. Such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.
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> Not having been taken by surprise by the evidence in question is not only indicated by the failure to object to such evidence as and when it was adduced. It is in any event, actually indicated also by the following circumstances in this case.

[7] What is important to note in both the examples above is related to evidence and not issue of law. A

[8] In the instant case, it was the pleaded case of the plaintiff that there was a written agreement between the plaintiff and the defendant on or about February 1999. This issue is a question of law. However, it is an undisputed fact that the plaintiff was only incorporated on 24 December 1999 and the February agreement has no legal nexus to the plaintiff at all. This distinction is vital in relation to the *locus* issue, that is to say the plaintiff has no *locus* to sue on the February agreement. *In addition, the plaintiff's case as per the pleading refers to February agreement (which it has no locus) throughout and seeks for relief which in our view is unsustainable in law for the plaintiff to obtain judgment based on an agreement which has no legal nexus to the plaintiff* (emphasis added). We will elaborate on this issue further in our judgment. Any reasonable tribunal having read the amended statement of claim in full will come to the conclusion that the plaintiffs claim is unsustainable in law when the agency agreement was not between the plaintiff and the defendant. B C D

[9] The memorandum of appeal *inter alia* reads as follows:

1. Pesuruhjaya Kehakiman Mahkamah Tinggi yang bijaksana terkhilaf kerana gagal memutuskan tuntutan Responden/Plaintif menurut Isu-isu Yang Dipersetujui Untuk Perbicaraan (Issues For Trial) yang dipersetujui oleh kedua-dua pihak semasa pengurusan kes diadakan di hadapan Yang Arif sendiri, yang mana isu utama adalah sama ada Perayu/Defendan ada memasuki apa-apa kontrak dengan Responden/Plaintif dalam bulan Februari 1999 dan yang mana keterangan diperbicaraan membuktikan Responden/Plaintif tidak wujud dalam bulan Februari 1999. E F
2. Pesuruhjaya Kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dalam memutuskan bahawa seseorang plaintif tidak terikat oleh Isu-isu Yang Dipersetujui Untuk Perbicaraan (not bound by the Issues For Trial) yang dipersetujui oleh kedua-dua pihak semasa pengurusan kes diadakan di hadapan Yang Arif sendiri. G
3. Pesuruhjaya Kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dan fakta dalam memutuskan bahawa suatu dokumen yang tidak jelas kandungannya dan yang tidak pernah ditandatangani oleh Perayu/Defendan boleh dianggap sebagai suatu perjanjian yang mengikat Perayu/Defendan dengan Responden/Plaintif walaupun syarikat Responden/Plaintif tidak wujud (belum dipertubuhkan) pada masa perjanjian dikatakan telah diwujudkan. H
4. Pesuruhjaya Kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dalam memutuskan bahawa Perayu/Defendan perlu membantah keterangan Responden/Plaintif yang bercanggah dengan Pernyataan Tuntutan Responden/Plaintif dari I

dikemukakan walhal Responden/Plaintif yang bertanggungjawab mengemukakan keterangan yang selaras dengan Pernyataan Tuntutan Terpindanya.

5. Pesuruhjaya Kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dan fakta dalam menetapkan jumlah RM2,209,555.00 sebagai jumlah yang perlu dibayar oleh Perayu/Defendan kepada Responden/Plaintif walaupun tiada keterangan yang sah dikemukakan oleh Responden/Plaintif tentang angka ini dan tanpa mengambil kira keterangan saksi dari HGVC Marketing Sdn Bhd.

[10] The statement of issues to be tried between the plaintiff and the defendant reads as follows:

1. Whether the Defendant had on or about February 1999 entered into an agreement with the Plaintiff and had any contractual relationship with the Plaintiff from February 1999?
2. If the answer to issue (1) above is in the affirmative, whether the Defendant unlawfully breached the said contract on 21-09-2001?
3. If the answer to issue (2) above is in the affirmative, whether due to the breach by the Defendant, the Plaintiff subsequently suffered loss and damages?
4. If the answer to issue (2) above is in the affirmative, whether there is a sum of RM2,389,164.42 due and owing by the Defendant as commission for service rendered pursuant to the said contract between the Plaintiff and the Defendant?
5. If the answer to issue (2) above is in the affirmative, whether damages are payable to the Plaintiff for unlawful breach/repudiation of contract by the Defendant?
6. If the answers to issues (4) and (5) above are in the affirmative, whether the Plaintiff's claim or part of it ought to be barred by the Limitation Act and/or by the Doctrine of Laches from being claimed by the Plaintiff against the Defendant?
7. If the answers to issues (4) and (5) above are in the affirmative, whether any settlement between the Defendant with HGVC Marketing Sdn Bhd and/or with Mr. Chua Kim Hwa should be deemed to be a settlement which binds the Plaintiff?

[11] What is important to note here is that the first issue is one related to law and if it is in favour of the defendant, then the plaintiff will have no case. In addition, we wish to say that the law recognises the fact that there may not be a written agreement in law for services rendered to enforce the terms as *per* the agreement but a claim for *quantum meruit* may be possible if it is the pleaded case of the plaintiff at least in the alternative. This was not the case here. There was no plea for *quantum meruit*. The plaintiff is bound by the admitted facts in its pleading that the plaintiff was incorporated on

24 December 1999, whereas the purported written agreement between the plaintiff and the defendant was on or about February 1999. (See the decision of the Supreme Court in *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490, and also the decision of the Federal Court in *Lim Kim Chuan v. Hari Singh* [1981] 1 LNS 90; [1981] 1 MLJ 241).

Brief Facts

[12] The facts of the case is well-articulated by the learned Judicial Commissioner and is reported as *Pacific Fantasy Vacation Sdn Bhd v. Heritage Grand Vacation Club Bhd* [2015] 1 LNS 746. In consequence, to save judicial time, we will not repeat the facts of the case. However, we would like to produce *verbatim* the submission of the plaintiff in relation to the facts and pleadings, which reads as follows:

> 3. The facts of this case will show that the Plaintiff/Respondent pleaded the Agency Agreement between the Plaintiff and the Defendant in the following terms:
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> In or about February 1999, the Plaintiff, through its agent, Ooi Chid Li entered into an Agency Agreement with the Defendant ("the Agreement") where essentially the Plaintiff is appointed as the Defendant's agents to sell the HGVC Memberships in return for commission.
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> [See the paragraph 4 of Respondent's Statement of Claim at page 53 of Rekod Rayuan Jilid 1/8]
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> 4. At the trial, PW1, Ooi Chid Li gave evidence that she executed the Agency Agreement in February 1999 on behalf of Pacific Fantasy Vacation and that she only formed Pacific Fantasy Vacation Sdn Bhd (the Plaintiff/Respondent) on 24-12-1999.
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> 5. PW1 further testified that the Plaintiff/Respondent was also in fact owned by her and the Plaintiff/Respondent adopted and implemented the February 1999 Agency Agreement and the Defendant/Appellant accepted the Plaintiff/Respondent as the agent under the Agency Agreement and continued to implement the said Agency Agreement.
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> 6. There was no objection taken by Defendant/Appellant to the introduction of this evidence.
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> 7. In the light of the above evidence, the learned Judge framed the following issues to be adjudicated and decided by the court [See paragraph 10 of the Grounds Judgment at Rekod Rayuan Jilid 1/8]:
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> (a) whether the plaintiff's claim must necessarily fail on a point of pleading, on the basis that the purported agreement was stated in the statement of claim to have been entered into prior to the date of incorporation of the plaintiff;

A (b) Whether order 24 of the Rules of Court 2012 operated to bind the parties to the specific issues delineated in the list of issues for trial agreed between the parties in the pre-trial case management conferences before the court. As the plaintiff had not yet been incorporated on the date specified in the first issue in the list of issues for trial, the defendant argued that this court
B must find that there was no contractual relationship between the parties at the material time and must accordingly dismiss the plaintiff's claim;

(c) whether there was any contractual relationship between the plaintiff and the defendant governing the payment of
C commissions on the sale by the plaintiff of timeshare memberships of the defendant, and in particular whether the defendant was bound to the plaintiff by the terms of the Agency Agreement;

8. The learned Judge relied on the Supreme Court authority of
D *Superintendent of Lands and Survey (4th Div) and Another v. Hamit bin Matusin and Others* [1994] 3 MLJ 185 which held that:

> ... when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it would be too late when it is only objected to later on, as in
E the final submission at the close of evidence in the instant appeal.
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> ... therefore, a court inevitably ought to inquire, when there is a failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of
F admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

9. The learned Judge correctly held that [at paragraph 19 of the Grounds of Judgement at page 17 of Rekod Rayuan Jilid 1/8]:

> in the present case, no objection was raised by the defendant
G when the plaintiff sought to introduce evidence that was at variance with its statement of claim. In my judgment, the evidence that was sought to be adduced did not constitute such a radical departure from the plaintiff's original claim as would justify dismissal of the plaintiff's action. The defect in the plaintiff's pleadings is therefore cured ...

H **[13]** What is clear from the submission of learned counsel of the plaintiff is that the plaintiff did not proceed as *per* the pleaded case and there was a different version placed before the court during trial without an amendment and that is fatal and ought not to have been condoned by the court, based on
I the 'gold standard' related to pleading rules as well as issues to be tried, which we had mentioned earlier. The fact that the evidence of different version was not objected to is immaterial in this case as the issue related to

the agreement is a question of law. Even in cases where there is no objection and the court is minded to uphold the evidence, the court should diligently direct the relevant party to amend the pleadings by way of an oral application to maintain fairness in trial process. Pleading rules is one relating to fairness and the court should at all times maintain the fairness process. Even in the case of *Superintendent of Lands and Survey*, the court had emphasised the duty to enquire which we have highlighted earlier. Only in exceptional facts that the 'gold standard' can be compromised to a particular evidence not a version which will be different from the pleaded case.

[14] We have read the appeal record and the able submissions of the parties. After giving much consideration to the submission of learned appellant's/defendant's counsel, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) Whether there was an agreement between the plaintiff and the defendant based on the February agreement is a question of law. No amount of evidence, version or story, etc will change the issue related to law.

(b) The plaintiff's version in our considered view, is a radical departure from the pleadings and the agreed issues, and is not just a variation, modification or development of what has been alleged in pleading in question or stated in the issues to be tried relating to law.

(c) Taking the facts of this case in a holistic manner and the fact that the agreement was not signed between the plaintiff and the defendant and there was no alternative claim for *quantum meruit*, and the fact that some third party has been paid by the defendant for the services rendered to the defendant, we do not think that it is a proper exercise of judicial discretion to waive the 'gold standard' related to pleading rules, to the prejudice of the defendant when the defendant's position is that there is no valid and enforceable agreement between the plaintiff and the defendant in law. In consequence, the judgment though was meticulous and reasoned, it did not pass the acid test of reasonableness when contrasted with the 'gold standard' relating to pleading rules its exceptions and its restricted application.

[15] For reasons stated above, we allow the appeal with costs of RM40,000 here and below, subject to allocatur. Deposit is to be refunded.

We hereby order so.